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No. 1146

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

DAVENPORT HOSIERY MILLS and UNITED HOSIERY MILLS,
Petitioners,

vs.

J. BUCKNER FISHER, Receiver of the Chattanooga National Bank,
Respondent.

PETITION FOR CERTIORARI AND SUPPORTING BRIEF.

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vs.

J. BUCKNER FISHER, Receiver of the Chattanooga National Bank,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered January 15, 1942, affirming the judgment of the District Court for the Eastern District of Tennessee, Southern Division.

OPINION BELOW.

The Circuit Court of Appeals filed no opinion. Its views are indicated in a memorandum per curiam reported in 124 F. (2d) 1018, affirming the judgment "in accordance with the findings of fact and conclusions of law of the District Court."

BASIS OF JURISDICTION.

Jurisdiction is invoked under 28 U. S. C., Sec. 347.

QUESTIONS PRESENTED.

The primary question presented in this petition is whether a depositor of an insolvent national bank who receives no asset of the bank directly or indirectly, but for a consideration received from a third party assigns to the third party a part of the deposit under a certificate issued by the bank providing for such assignment and attempted to be secured by a pledge of its assets, admittedly void because ultra vires, receives a preference in violation of 12 U. S. C., Sections 91 and 194.

A corollary question presented is whether such depositor, by reason of the consideration so received from the third party, is estopped to deny the validity of such ultra vires pledge by the bank.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

These two actions were filed by a receiver of a national bank to recover certain sums claimed to have been received by petitioners (as creditors), hereinafter called defendants, when the bank was insolvent, in violation of 12 U. S. C., Sections 91 and 194. In both cases, which were consolidated for trial and appeal, judgments were awarded plaintiff, subject to counterclaims not disputed. The essential facts on the questions urged here are as follows (all dates referred to being in the year 1933):

While open on a "restricted basis" under proclamations of the President and regulations of the Secretary of the Treasury, the bank issued to defendants certificates of partial assignments, referred to in the record as "scrip certificates" or "scrip," aggregating, in face amount, in No.

2188, the sum of $18,274.00 (R. 37, 99), and, in No. 2189, $3,571.15, respectively, reading as follows (R. 61):

"5 Chattanooga National Bank 5
Chattanooga, Tennessee C 1304

"Five Dollars of a deposit in the Chattanooga National Bank of Chattanooga, Tennessee, has been assigned by the depositor thereof to the bearer hereof.

"The Chattanooga National Bank of Chattanooga has accepted this assignment and agrees to credit the account of the bearer in said bank with said amount upon the presentation hereof.

"Any credit in said bank created by presentation of this assignment to the credit of bearer is subject, at the option of said bank, to the issuance of like assignments for a period of six months from the date hereof.

Chattanooga National Bank,
W. H. DeWitt,
Cashier.

"This March 10, 1933
"5 5"

All certificates received by defendants were transferred to third parties, principally employees, in satisfaction of wage claims, and by them in turn transferred to other third parties (R. 86).

The bank attempted to pledge some of its assets to a trustee to secure the certificates (R. 36, 66-68) "under asserted reliance on Treasury Regulation No. 10" (R. 35). That Regulation (R. 43) did not confer on the bank power to make such a pledge. It authorized a national bank to the end of meeting needs of the community for food, medicines, etc., and for the payment of salaries and wages, to "exercise its usual banking functions to such extent as its situation shall permit." Regulations of the Secretary of the Treasury, promulgated March 7th and 9th, granted permission to "Clearing House Associations and other

associations organized to provide an adequately secured medium of temporary exchange" to issue certificates "to be delivered by each institution to its creditors and depositors on a pro rata basis" (R. 35, 62-64). The certificates in question were not issued by a clearing house or any other association organized to provide a medium of temporary exchange. They were originally intended to be so issued, but that plan was abandoned (R. 147-148, 165). And they were not delivered to all creditors and depositors of the bank on a pro rata basis (R. 40).

The certificates outstanding were eventually "redeemed," not by the bank, but by a Conservator for the bank under the following circumstances: On March 16th he wrote the Comptroller requesting authority to "redeem this scrip in cash" (R. 72-73). A reply authorized the redemption (R. 74), which was made (R. 38).

As respects the "circulation" of the certificates, some individuals and business establishments would accept them at face value, and others would not (R. 103-104).

Defendants denied violation of 12 U. S. C., Sections 91 and 194, because they received no asset of the bank. Their receipt and transfer of the certificates merely effected partial assignments of their deposits and thus a substitution of creditors, but no transfer or diminution of the assets of the bank. The attempted pledge to secure the certificates was void for lack of power on the part of the bank to make the pledge. The illegal "redemption" of the certificates by the Conservator was not within the scope of 12 U. S. C., Section 91, which relates only to acts of banks and not to acts of conservators, but, even if it were, it was a transaction to which defendants were strangers. The payment was a matter with which they had nothing to do and was made to third parties who received the same in their own right and were in no way related to defendants.

Views of the Lower Courts.

The District Court filed a brief opinion (R. 183-185), not reported, stating that by reason of their accepting and using the scrip certificates, "defendants are estopped to question the validity of the issuance of said scrip and the security made therefor," that they "received preferential benefits," and that "The depletion of the assets of the bank whereby the defendants were preferred is a violation of this statute, and it is immaterial in what manner the assets were depleted."

In a motion for a new trial (R. 192-195) defendants contended there was no predicate in the pleadings or the proof for estoppel. In a further opinion (p. 197) the Court expressed the views (R. 197-198): That the pledge was "illegal and invalid"; that the certificates were an attempt by a single bank "to put into circulation evidence of debt against the bank" for which "there is no statutory authority"; that defendant received the same benefit from the receipt and use of the scrip that it would have received had it been money; wherefore, "defendant has waived its right to question the validity" of the pledge to secure the scrip. It added that the parties were not "in pari delicto," because defendant was "charged with knowledge of the law" and "participated in the unlawful transactions"; and that "the whole transaction was void in its incipiency," with resulting liability on defendant "for money had and received." The Court, however, did not find or even suggest that defendants "had and received," directly or indirectly, money that had ever belonged to the bank or in which it ever had any right, title or interest.

The Circuit Court of Appeals, as shown hereinabove (p. 1), without opinion simply indicated its approval of the conclusions of law of the District Court.

REASONS FOR GRANTING WRIT.

The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

It has decided another important question in conflict with a decision of this Court and with decisions of other Circuit Courts of Appeal.

1. Important Question of Federal Law.

12 U. S. C., Sections 91 and 194, are important statutes relating to transactions with insolvent national banks. In substance, they forbid preferential transfers by, and require a ratable distribution between creditors of, such banks. An important question here involved is whether an assignment of a claim against an insolvent bank, involving a mere substitution of creditors, in connection with which the assignor receives a "benefit" from a transaction with third parties, but no asset of the bank, constitutes a violation of those statutes. A similar question with reference to corresponding provisions of the Bankruptcy Act has been decided by this Court. In **National Bank of Newport v. National Herkimer County Bank**, 225 U. S. 178, 56 L. ed. 1042, the question was answered in the negative. No valid reason can be given for a different treatment of the statutes relating to preferential transfers by insolvent national banks. Like the corresponding provisions of the Bankruptcy Act, they speak only in terms of transfers and diminution of assets. They do not speak in terms of "benefits" received by creditors, especially where such benefits are not received at the expense of the insolvent debtor.

2. Conflict With Decisions of This Court and of Other Circuit Courts of Appeal.

The Circuit Court of Appeals has also decided a question in conflict with decisions of this Court and of other Circuit Courts of Appeal. That question is whether a party to an attempted pledge, admittedly void because ultra vires, of the assets of a national bank is estopped to deny the validity of the pledge because he has received "benefits" in connection therewith, but no assets of the bank, where none of the elements of common-law estoppel in pais are present. That question has been answered in the negative by this Court in **Texas & P. R. Co. v. Pottorff**, 291 U. S. 245, 78 L. Ed. 777, by the Circuit Court of Appeals for the Fourth Circuit in **Leonard v. Gage**, 94 F. (2d) 19, for the Seventh Circuit in **Granzow v. Village of Lyons**, 89 F. (2d) 83, and for the Ninth Circuit in **Security etc. Co. v. Henderson**, 120 F. (2d) 449.

Wherefore, it is respectfully submitted that the writ prayed for should be granted.

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BRIEF.

I.

THERE WAS NO TRANSFER OF ASSETS OF THE BANK TO DEFENDANTS WITHIN THE MEANING OF 12 U. S. C., SECTIONS 91 AND 194.

A. Defendants' receipt and assignment of the scrip certificates constituted merely a substitution of creditors and no transfer or diminution of the assets of the bank.

As appears clearly from the certificates (supra, p. 3), they were mere forms for making partial assignment of accounts at the bank. If A, having an account of $100.00 in the bank, obtained certificates for $50.00 and transferred them to B, B was simply the half owner of a claim against the bank, and his interest was identical with the half interest retained by A, viz., the interest merely of a general and unsecured creditor. Such a partial assignment in no way diminished the assets of the bank. It was merely a substitution of one creditor for another. Wherefore the issuance of such certificates to defendants, without more, of course, could constitute no violation of 12 U. S. C., Sections 91 and 194, which are designed to prevent preferential transfers and to insure ratable distribution of the assets of insolvent national banks.

The attempted pledge of assets to secure the certificates was void, as the lower courts held. It violated the principle of law that, except for purposes expressly authorized by Federal statutes, a national bank has no power to pledge its assets.

Texas & P. R. Co. v. Pottorff, 291 U. S. 245, 78 L. ed. 777;

City of Marion v. Sneeden, 291 U. S. 262, 78 L. ed. 787.

The transfer of the certificates, therefore, conferred on the transferees no right other than that of an unsecured creditor of the bank and in no way diminished its assets available for general creditors.

B. The "benefits" received by defendants from their use of the certificates constituted no transfer or diminution of assets of the bank.

1. Such benefits were not, directly or indirectly, a part of the bank's assets or anything in which it had any right, title or interest.

In using the certificates defendants obtained satisfaction of wage claims of their employees, and defendant in No. 2188 also obtained a credit to its account at another bank. But those wage claims never belonged to the bank, so that the satisfaction thereof in no way transferred or diminished its assets. Nor did any such transfer or diminution occur when defendant in No. 2188 deposited certificates at the other bank which, as assignee, simply stepped into the shoes of the assignor as an unsecured creditor. Again, it was simply a substitution of creditors.

2. Receipt by a creditor of a "benefit" not received by other creditors constitutes no transfer of assets within these statutory provisions where the bank has no right, title or interest, directly or indirectly, in or to the thing received.

So far as known, the question here involved has not been adjudicated in any reported case involving alleged preferential transfers by national banks, but in cases arising under corresponding provisions of the Bankruptcy Act the courts have consistently held that there is no preference within the inhibitions of that Act where the payment or transfer is by or with funds or property of a third person and not from the general assets of the bankrupt.

National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, was brought by the trustee in bankruptcy of Newport Knitting Company to recover from Herkimer County Bank an alleged preferential payment. The payment had been made by the Titus Sheard Company, which had indorsed paper of the knitting company and discounted it with the bank. The Titus Sheard Company was indebted to the knitting company, and, upon the insolvency of the latter, it paid and took up the paper which it had indorsed and discounted with bank, and set it off against its debt to the knitting company. In holding that the "benefit" so received by the bank did not constitute a preference, the Court, speaking through Mr. Justice Hughes, said:

> "It is not the mere form or method of the transaction that the act condemns, but **the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim**, so that thereby the estate is depleted."

Therein the Court affirmed a decision of the Second Circuit Court of Appeals (reversing the District Court), wherein the Court, per Judge Noyes, stated the fundamental principle as follows (172 Fed. 529, 530):

> "The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property, there is no preference. And that is the primary difficulty with the complainant's case."

In **Grubb v. General Contract Purchase Corp.** (C. C. A. 2), 94 F. (2d) 70, the bankrupt, pressed by defendant creditor, arranged to meet its obligation to it by transactions attacked by the trustee as voidable preferences.

Note: All emphasis ours unless otherwise indicated.

In one instance $25,000.00 was borrowed by discounting the bankrupt's note at a trust company, the proceeds of which were placed to the bankrupt's credit in the trust company, and a check for the same amount was drawn to the trust company in exchange for a cashier's check payable to defendant. This check was delivered to defendant in exchange for collateral (which, unknown to defendant and the trust company, was forged) held by defendant as security for the bankrupt's obligation. The issues involved and contentions of defendant, which were upheld, were thus stated by Judge L. Hand (p. 72):

> "the plaintiff asserts that the case is no more than the usual one of preferences under section 60b. The defendant answers that in none of the three cases was the money ever within the bankrupt's control or a part of its assets, **and that the transactions were therefore no more than the substitution of one creditor for another without loss to the estate,** as when a surety gives money to his principal to discharge the debt. National Bank of Newport, N. Y., v. National Herkimer County Bank, 225 U. S. 178, 32 S. Ct. 633, 56 L. Ed. 1042; Bielaski v. National City Bank, 2 Cir., 68 F. (2d) 723. As to the first transaction there can be no doubt that the defendant is right."

In Re Loring (D. C. Mass.), 30 F. Supp. 758, is peculiarly in point, involving not only receipt by a creditor of a "benefit," in the form of satisfaction of the debt, but also an attempted hypothecation of assets of the insolvent in connection with the transaction. The bankrupt, indebted to defendant, entered into an arrangement with defendant and a third party whereby the bankrupt gave his note to the third party and executed a chattel mortgage on his property to secure the note, and the third party paid off the bankrupt's indebtedness to defendant. The chattel mortgage was adjudged invalid for failure to record it in compliance with the State law. The Referee held the pay-

ment a voidable preference. In vacating the order the Court said (p. 759):

> "Inasmuch as the chattel mortgage is void as to the trustee, the situation * * * is that the bankrupt, shortly before bankruptcy, gave his note to the Bushway-Whiting Ice Cream Co., the main consideration for which was the Bushway-Whiting Company's agreement to take over the indebtedness of Dutchland. The payment to Dutchland was made in compliance with that agreement. The bankrupt never had possession of the proceeds of the note, and the payment did not result in any diminution of the bankrupt's estate.
>
> "* * * such a transaction does not constitute a voidable preference. **If the mortgage had been upheld as a valid prior lien upon the assets of the bankrupt, a different conclusion might follow * * *.**"

To the same effect as the three cases last above cited are **In re Kerlin** (C. C. A. 6), 209 Fed. 42; **Miller v. Fiske Tire Co.** (D. C. Minn.), 11 F. (2d) 301; **Olmstead v. Massachusetts Trust Co.** (D. C. Mass.), 11 F. (2d) 410; **In re Hines** (D. C. Pa.), 144 Fed. 543; **Fry v. Pennsylvania Trust Co.**, 195 Pa. 343, 46 A. 10; **Goode v. Elwood Lodge**, 160 Ind. 251, 66 N. E. 742; **McKay v. Sperry Flour Co.**, 95 Wash. 209, 163 P. 377; **Ajax Shoe & Leather Co. v. Selig**, ... Mass. ..., 25 N. E. (2d) 990.

C. **The payment by the Conservator in "redemption" of the certificates was not a transfer by the Bank within 12 U. S. C., Section 91.**

12 U. S. C., Section 91, which voids transfers by insolvent national banks, applies only to such transfers by the banks under the control of their own officers. It does not apply to transfers by officers or agents of the United States who have taken banks out of the hands of their own officers. It is headed:

"§ 91. Transfers **by bank** and other acts in contemplation of insolvency."

Any doubt is dispelled by the decisions that illegal transfers by receivers of assets of national banks are recoverable, not under this section, but on the common-law theory of payment by Government officers under mistake of law.

O'Connor v. Rhodes (C. C. A. D. C.), 79 F. (2d) 146;
Granzow v. Village of Lyons (C. C. A. 7), 89 F. (2d) 83;
Leonard v. Gage (C. C. A. 4), 94 F. (2d) 19, 24.

For all purposes here material conservators in charge of national banks have the same status as receivers. 12 U. S. C., Section 203.

D. **Even if the payment by the Conservator constituted such a transfer, defendants did not "participate" therein.**

1. The payment was a matter with which defendants had nothing to do.

The action of the Conservator in obtaining authority to "redeem" the certificates was independent official action on his part. His motive is indicated in his letter to the Comptroller (R. 37-38, 73):

"We * * * hope you can * * * wire us the necessary authority, as it will * * * allay the fears of the group of people who now hold this scrip, * * *."

And the Comptroller's granting of the request was likewise independent official action on his part (R. 38, 74).

2. The payment was made not to defendants, directly or indirectly, but to third parties who received the same in their own right.

All the certificates received by defendants were delivered to third parties who became the owners thereof in their own right and were free to do with the certificates

as they pleased, to tear them up, to keep them for souvenirs or to pass them to others who would take them. What they did with them was of no concern to defendants. They were not agents of or in privity with defendants. But they are the parties to whom the Conservator, without authority of law, paid the money. They are the ones who did "participate" in the illegal payment; and, whether it was a preference under the statutory provisions in question, or a payment by a Government officer under mistake of law, they are the parties whom plaintiff should have sued.

II.

DEFENDANTS ARE NOT ESTOPPED TO DENY THE VALIDITY OF THE ATTEMPTED PLEDGE OF ASSETS OF THE BANK TO SECURE THE CERTIFICATES.

The holding of the lower courts that defendants are estopped to deny the validity of the attempted pledge of assets to secure the certificates, admittedly void, is in the teeth of the ruling in **Texas & P. R. Co. v. Pottorff**, 291 U. S. 245, 78 L. ed. 777, that (p. 260):

> "The receiver is not estopped to deny the validity of the pledge. The Railway's argument is that the bank could not set up the defense of ultra vires since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. **The bank itself could have set aside this transaction.** It is the settled doctrine of this Court that no rights arise on an ultra vires contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised."

In that case valuable "benefits" admittedly had been received by the bank in that the pledge had relieved it of

large premiums on surety bonds for which it was substituted. But the receipt of such "benefits" was held to work no estoppel.

A similar effort to uphold, on the basis of estoppel, a pledge of assets by a national bank was made in **Granzow v. Village of Lyons** (C. C. A. 7), 89 F. (2d) 83, with respect to which the Court said (p. 85):

> "Being void, the transaction could not be confirmed, ratified, enforced or rendered enforceable by the application of any doctrine of estoppel or otherwise."

A like decision was rendered in **Security Realization Co. v. Henderson** (C. C. A. 9), 120 F. (2d) 449, 453, and in **Leonard v. Gage** (C. C. A. 4), 94 F. (2d) 19, 22.

In the case at bar a holder of the certificates was in precisely the same position as the depositors in the three cases last above cited. In each instance the attempted pledge was void, and the holder of the claim attempted to be secured by a pledge of the bank's assets was in fact the holder of nothing but an unsecured claim. In each instance benefits had been received by the party sought to be estopped. The question of estoppel in the case at bar is substantially the same question presented in the three cases cited.

The situation is controlled by the Federal statutes as construed by the Federal courts. But the same result follows from consideration of the doctrine of estoppel under the common law as applied by the Supreme Court of Tennessee. There is present none of the essential elements of estoppel in pais, which are stated in **Taylor v. R. R. Co.**, 86 Tenn. 228, as follows (p. 243):

> "Mr. Bigelow, in his very able and exhaustive work upon estoppels, upon a consideration of all the cases defining an estoppel by conduct, sums up the requisites of such an estoppel:

" 'First—There must have been a representation or a concealment of material facts.

" 'Second—The representation must have been made with knowledge.

" 'Third—The party to whom it was made must have been ignorant of the truth of the matter.

" 'Fourth—It must have been made with the intention that the other party should act upon it.

" 'Fifth—The other party must have been induced to act upon it.' Bigelow on Estoppel, 480."

With the essential elements thus outlined, to what extent, if any, are they here present?

1. What "false representation or concealment of material facts" was there by defendants?

2. What "knowledge, actual or constructive, of the facts" did defendants have that the bank or the Conservator did not have?

3. In what respect was the bank or the Conservator "without knowledge or means of knowledge of the real facts"?

4. What false representation or concealment of material facts was there by defendants with an "intention" that it be acted on by the bank or the Conservator?

5. What false representation or concealment of material facts by defendants was "relied on or acted on" by the bank or the Conservator to its or his prejudice?

III.

THERE IS NO BASIS FOR RECOVERY OF MONEY HAD AND RECEIVED.

The view that recovery might be had on the principle of money had and received was expressed by the District Court as a make-weight in its opinion on the motion for a new trial. It may be disposed of simply by pointing out (a) that defendants admittedly received nothing directly or indirectly from the bank's assets, and (b) that the action of money had and received lies only to remedy an injustice as between the parties, resulting in unjust enrichment, contrary to equity and good conscience under principles of common law (4 Am. Jur., p. 508). As between a common-law debtor and creditor (such as a bank and its depositor) it does not lie, since as between them there is no injustice in the use of the debtor's money for the benefit of the creditor, whether the debtor be solvent or insolvent. At common law there is no such thing as an illegal preference.

Respectfully submitted,

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